IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1684 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? Yes

J

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

AHMED SALEH PATEL

Versus

CHIMANBHAI KHIMCHAND DHRUV

Appearance:

MR DD VYAS for Petitioner

MR KH KAJI for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 27/07/98

ORAL JUDGEMENT

The landlord - revisionist feeling aggrieved from the Judgment and Decree of the lower Appellate Court has preferred this revision under Section 29(2) of the Bombay Rent Act, 1947 (for short "the Act").

2. The revisionist is the owner -landlord of the disputed premises consisting of two rooms. It was let out on monthly rent of Rs.64/- to the defendant No.1. He fell in arrears of rent for more than six months whereupon the notice of demand was sent on 3.9.1976. The notice of demand remained uncomplied with. The Suit for eviction was filed on four grounds. The first was non-payment of arrears of rent exceeding six months within a month of service of notice of demand. The second ground was that defendant No.1 had illegally sub-let a portion of the premises, viz. one room to the defendant No.2 and was deriving profit therefrom. The third was that the tenant in chief had raised permanent structure in the disputed premises without written permission of the landlord and the last was the change of user of the premises for purpose other than that for which it was let out.

3. Both the defendants contested the Suit. The defendant No.2, the alleged sub-tenant, adopted written statement of defendant No.1. The defendant No.1 denied all the four allegations and pleaded for dismissal of the Suit.

4. The trial Court, after considering the evidence on record, found that the three grounds, viz. the tenant raising permanent structure without written permission of the landlord, change of user and tenant falling in arrears of rent for more than six months were not proved. It, however, found that the allegation of illegal sub-letting by the defendant No.1 to the defendant No.2 was proved. Accordingly the Decree for eviction was filed.

5. The matter was taken up in Appeal. The Appellate Court dis-agreeing with the findings of the trial Court on sub-letting, dismissed the suit for eviction. It is, therefore, this revision by the landlord.

6. The learned Counsel for the revisionist contended that the trial Court for cogent reasons came to the conclusion that it was a case of sub-letting and the reversal of the said findings by the lower Appellate Court is contrary to law. The learned Counsel for the respondent on the other hand contended that the findings recorded by the lower Appellate Court are correct and that of the trial Court incorrect.

7. The only point for adjudication is whether the Judgment and Decree passed by the lower Appellate Court

is in accordance with law. In order to see whether the Judgment and Decreeof the lower Appellate Court is or is not in accordance with law, it has to be kept in mind that in every case the lower Appellate Court is not bound to put a seal over the Judgment of the trial Court. The Lower Appellate Court is entitled to re-assess the evidence and give its own finding. However, in doing so the lower Appellate Court has to specifically set aside the findings of the trial Court on which it is in dis-agreement with those findings. If this is so then the revisional court will not interfere with the findings of the lower appellate Court simply because it is non-concurrent findings. The revisional court will also not substitute its own views over the view taken by the lower Appellate Court in case the two views are permissible from the record and one view has been taken by the lower Appellate Court. With these guidelines the Judgment of the lower appellate Court has to be examined.

8. In order to establish sub-letting initial burden is on the landlord and he has to establish that the defendant No.1 had illegally sub-let the suit premises to the defendant No.2. In discharging this onus the landlord is not required to prove or establish rent note the terms and conditions of the tenancy. It is nobody's case, in the instant case, that there was even oral agreement between the landlord and the defendant No.1 that he will be authorised to create sub-tenancy. Consequently if sub-tenancy has been created it will have its own consequences against the tenant in chief even in the absence of proof of terms of tenancy. It is not a case where any rent note was executed between the landlord and the tenant.

9. In order to establish sub-tenancy it is really difficult for any landlord to establish by direct evidence that the tenant in chief has inducted sub-tenant illegally. A contract of sub-tenancy is always secret contract and the terms of such contract are not and cannot be within the knowledge of the tenant in chief. However, the landlord has to establish two ingredients for proving sub-tenancy. The first is that the tenant in chief has parted with exclusive possession of the entire tenanted premises or portion thereof to the sub-tenant. The second ingredient is that this parting of exclusive possession was for valuable consideration. Again for establishing the second ingredient it is always difficult for the landlord to establish that the secret contract was for valuable consideration. However, from the circumstances of the case inference regarding valuable consideration for parting with possession or exclusive

possession of whole or part of the premises can be drawn.

10. Certain circumstances were relied upon by the trial Court for establishing sub-tenancy. Those circumstances were disbelieved by the lower Appellate Court. Whatever may be the approach of the two courts below the trial Court found that subsequent agreement between tenant in chief and the sub-tenant executed on stamp paper Ex.54 was forged document. This aspect of forgery was highlighted for the reasons given by the trial court in its judgment. The Appellate Court, however, in the concluding portion of its Judgment observed "that the trial Judge has made certain observations which are not consistent with the facts on record." It further proceeded to observe that "I do not agree with the reasoning given by the learned trial Judge as it appears that he was carried away by the fact that Ex.54 has been created for this Suit." This impliedly amounts to setting aside the finding of the trial Court that Ex.54 was a concocted or a forged document. The Lower Appellate Court further observed that even if Ex.54 is excluded from consideration,on oral evidence, the case of the defendant No.1 seems to be more probable and accordingly after examining the oral evidence of the parties the lower Appellate Court found the evidence of the defendant No.1 more reliable than the evidence of the plaintiff who is none-else than the attorney of the plaintiff. The plaintiff has not entered the witness box.

11. On the point of parting with exclusive possession of one room to the sub-tenant the view taken by the two courts is divergent. From the topography of the two rooms the trial court found that because there were two doors in two rooms it can be inferred that exclusive possession was given to the sub-tenant, but this was not agreed by the lower Appellate Court. The Lower Appellate Court was justified in holding so.

12. The concept of transfer of exclusive possession implies that the tenant in chief for all purposes has lost effective control of the part of the tenanted portion. It is clear from the record and the evidence on record that diamond cutting machines were installed in one of the rooms. The plaintiff is not claiming ownership in these machines. The defendant No.2 who is alleged to be sub-tenant is also not claiming title in these machines. The defendant No.1 has claimed title in the machines and even if he failed to examine his brother it is not a ground for drawing adverse inference inasmuch as neither the plaintiff nor the defendnt No.2 is

claiming title in the diamond cutting machines.

13. It is also in evidence that in the other shop the tenant in chief is running business is tobacco, etc.

14. It is immaterial whether the defendant No.2 was given occupation of the room at the time of inception of tenancy or subsequently. It is in evidence that the defendant No.2 is using only the diamond cutting machines and that too for a limited period of time, viz. from 8.00 a.m. to 12.00 noon and thereafter from 2.00 p.m. for a short while. Thus, this evidence itself rules out the possibility that the room inwhich the diamond cutting machine is installed is in exclusive possession of the defendant No.2 for all the 24 hours a day. The defendant No.1 has stated that he has given the diamond cutting machine to the defendant No.2 on rent of Rs.151/- p.m. There can be no inference that simply because the machine was rented the premises was also rented to the sub-tenant by the tenant in chief. After all if the permanent fixture of diamond cutting machine is installed in one of the rooms and it has been rented to the defendant No.2 for being used for a limited time it implies that the defendant No.2 for using the said machines during the said limited period must enter the said room and during that limited period it can be said that the sub-tenant is in possession of one of the rooms, but that will not mean that he is in exclusive possession of the said room.

15. The trial Court placing reliance on a Madras Judgment in M.Rodgers V/s. M. Prakash Rao Naidu, (1996) 1 M.L.J. 332) found that on identical facts it was held to be a case of sub-tenancy. The facts in this case were that the tenant was running press in the building with his machinery. He stopped the business and leased the machineries to his Manager who started running press in the same premises. In such circumstances it was held that the lease is not merely of machinery, but the rent includes the use of the premises as well. Therefore there is sub-letting of the premises.

16. This case, to my mind, is distinguishable on facts. Here it seems to be a case where exclusive possession of the premises as well as press machine was transferred to the manager of the tenant in chief. The Court also found that the rent includes the use of premises as well as machinery. However, in the case before me it is not a case of transfer of exclusive possession. Further, from the evidence on record it cannot be held that Rs.151/- were charged as rent for the premises as well as for machines.

17. The contention that charging of Rs.151/- amounted to profiteering by the tenant in chief also can be no ground for up-holding sub-tenancy. No doubt the tenant in chief was obliged to pay Rs.64/- p.m. only as rent, but once he has installed costly machines for diamond cutting he must have let it out, viz. the machinery for use for a limited period at Rs.151/- p.m. and this cannot be said to be profiteering by sub-letting of one of the rooms. Mere statement of the defendant No.1 in cross examination that he had given a small room of the suit premises to the defendant No.2 is incapable of drawing inference for transfer of exclusive possession. Mere omission of the defendant No.1 to mention regarding agreement Ex.54 in his reply notice is also not a circumstance for drawing adverse inference on sub-tenancy or transfer of exclusive possession.

18. No doubt the defendant No.2 is not related to the defendant No.1, but this fact alone is not enough for drawing inference on sub-tenancy. When there is positive evidence that stranger defendant No.2 was permitted only to use the machinery for a limited period in a day he cannot be said to be a sub-tenant. The presence of the stranger in the suit premises for limited hours in a day in these circumstances stands sufficiently explained and can be no ground for drawing inference in favour of the landlord regarding his allegation of sub-tenancy.

19. The trial Court drew adverse inference against the defendant No.1 for not producing the account books. If the account books would have been filed it would not have been mentioned therein whether the rent was charged for the premises or for the machineries. More over there is positive evidence that only machinery was permitted to be used by the defendant No.2 hence there was no occasion for the trial Court for drawing such adverse inference.

20. So far as transfer of possession for valuable consideration is concerned it is in evidence that Rs.151/- p.m. were charged by the defendant No.1 from defendant No.2, but this valuable consideration was not for transfer of possession of one of the rooms to the defendant No.2 but for permitting the defendant No.2 to use the diamond cutting machines for limited hours in a day. The valuable consideration for transfer of possession is therefore not established even by implication or by admission of payment and charging Rs.151/- by the defendant No.1 from the defendant No.2.

21. The Lower Appellate Court rightly observed from

the material on record that the machinery was installed by the defendant No.1 and it was given for use to the defendant No.2. The defendant No.2 was not in exclusive possession of the suit premises or part of it. The defendant No.1 had not lost control over the suit premises. This finding of fact recorded by the lowerAppellate Court cannot be disturbed in this revision. Thus the first condition to establish sub-tenancy is not proved so also the second condition, viz. transfer of possession for valuable consideration. The view taken by the lower Appellate Court was therefore perfectly in accordance with law. The Judgment and Decree of the lower Appellate Court, being in accordance with law, no interference is called for. The revision being without merit is liable to fail.

22. The revision is hereby dismissed. No order as to costs.

sd/-

* * * * *

sas